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In the

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1316~~ 1316

JACK CARROLL SMITH and
THOMAS EDWARD BANNON,

Petitioners,

v.

THE STATE OF TEXAS,

Respondent.

Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

RONALD R. WALDIE,
1115 Fidelity Building,
1000 Main Street,
Dallas, Texas 75202,
RALPH LYNN McDOWELL,
1115 Fidelity Building,
1000 Main Street,
Dallas, Texas 75202,
EMMETT COLVIN, JR.
1115 Fidelity Building,
1000 Main Street,
Dallas, Texas 75202,
Counsel for Petitioners.

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THE STATE OF TEXAS,

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Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

---

Petitioners pray that a Writ of Certiorari issue to review a judgment of the Court of Criminal Appeals of Texas entered in Cause Number 38,575, styled Thomas Edward Bannon, Appellant v. The State of Texas, Appellee, and Cause Number 38,576, styled Jack Carroll Smith, Appellant v. The State of Texas, Appellee, on December 8, 1965, Motion For Rehearing being denied in said causes consolidated on appeal on February 2, 1966, by written opinion. The Second Motion For Rehearing of Petitioner was denied without written opinion on March 9, 1966. A copy of the original and con-

curring opinion is included herein as Appendix A, and of the Opinion and dissenting opinion on Motion For Rehearing as Appendix B.

The Honorable Hugo L. Black granted Petitioners, on April 12, 1966, a Stay of the Mandate of the Texas Court of Criminal Appeals pending the timely filing and disposition of a Petition for Writ of Certiorari.

JURISDICTION

The jurisdiction of this Court to review the case on Petition for Writ of Certiorari rests upon 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

1. Whether or not Petitioners' rights under the Fourteenth Amendment to the Constitution of the United States were violated by the comment of the Prosecutor during oral argument on Petitioners' failure to testify?

   (a) Whether the remarks of the Prosecutor in oral argument constituted a comment on Petitioners' failure to testify?

2. Whether or not Petitioners' rights under the Fourteenth Amendment to the Constitution of the United States were violated by the admission of the oral confessions of Petitioners made in absence of counsel and without advice as to their right to counsel under the Sixth and Fourteenth Amendments to the Constitution of the United States?

STATUTES INVOLVED

The statutory provisions involved are Article 1422 of the Texas Penal Code (Appendix C) and Article 710 of the Texas Code of Criminal Procedure of 1925 (Appendix D).

STATEMENT OF THE FACTS

Petitioners were separately charged by information, but were convicted upon a joint trial for misdeameanor theft under Article 1422 of the Penal Code of Texas; the punishment for each being assessed at thirty (30) days in jail and a fine of One Hundred Dollars ($100.00). This conviction was affirmed by the Court of Criminal Appeals of Texas by written opinion on December 8, 1965. Motion For Rehearing was denied by written opinion on February 2, 1966. Petitioners' Second Motion For Rehearing was denied on March 9, 1966, without written opinion. Petitioners' moved for a Stay of the Mandate pending a granting of the Stay by this Court, the Mandate being Stayed by the Texas Appellate Court until April 30, 1966. Thereafter, this Court on April 12, 1966, entered its Order Staying the Mandate of the Texas Court of Criminal Appeals.

Under the facts adduced at the trial of the cases, the manager of an apartment unit testified that shortly after midnight, he saw an automobile occupied by two men parked near the rear of the apartment house; that after a brief time and from a distance of ten feet, he saw such automobile parked in the driveway in front of the apartment house; the owner of the apartment house noticed that some furniture was missing from an unoccupied apartment of the ag-

gregate value of Forty Dollars ($40.00). A detective who investigated the scene of the theft, testified that some eight days later, he stopped an automobile for speeding, observing at the time that it was the same type of car that had been seen at the apartment house. He advised the occupants of the automobile, Petitioners, that he was a police officer and that he wanted them to accompany him to the police station; which they did. According to the detective's testimony, he interrogated both Petitioners at the police station and they ultimately admitted taking the furniture from the apartment, and they agreed with the officer that they would bring the furniture to the police station. The officer permitted them to leave the police station and they voluntarily returned with the furniture to the station. No charges had been filed against them when they returned the furniture, but at that time the police officer stated to them, "I am not sure what charge I will file on you, and I would advise you to get an attorney.", and he then released them. The next day, an attorney, representing both Petitioners, telephoned the officer and the officer advised the attorney that his clients had not been filed on but that they would be. In response to the contention of Petitioners that the Trial Court erred in admitting the oral statements of Petitioners made while they were under arrest and without offering Petitioners assistance of counsel before such statements were made, the Texas Appellate Court took the position that the admission of such oral statements in evidence was authorized under the provisions of Article 727, Texas Code of Criminal Procedure

of 1925, and since Petitioners did not at any time request counsel the contention as to the assistance of counsel before the statements were made was overruled.

Further, in the course of argument before the jury, the Prosecutor commented upon Petitioners' failure to testify as is more fully reflected by the dissenting opinion of Judge W. A. Morrison, set forth in the Texas Appellate Court's opinion on Petitioners' Motion For Rehearing before that Court (Appendix B). Judge Morrison, one of the three judges of said Texas Appellate Court, dissented on the ground that the case should be reversed under the principles of *Griffin v. California*, 380 U.S. 609. Judge W. T. McDonald in his concurring opinion. (Appendix A), chastized the Prosecutor for what amounted to "am improper comment by the Prosecutor", further stating that he did not condone such practice and, in fact, condemned it. He admonished that such trial strategies, if allowed, would in effect be arming the State with a weapon it was not entitled to use, and that a continuation of such trial antics would call for a reversal of many cases.

A full account of the objectionable argument is set forth in the dissenting opinion (Appendix B). The verbal plastic surgery in the original opinion is thus revealed.

Ergo, of the three Appellate Judges, two thought the comment to be such as to reverse many cases, whereas one did not.

REASONS FOR GRANTING THE WRIT

1. Petitioners' rights under the Fourteenth Amendment to the Constitution of the United States were violated by the Prosecutor commenting on their failure to testify during his argument to the jury.

At the trial of the causes in State Court the Prosecutor, in a calculated manner, proceeded to effectively comment upon Petitioners' failure to testify in the manner as fully set forth in the dissenting opinion of Judge W. A. Morrison (Appendix B). Such complained of argument also offended against the rule found in Article 710, Texas Code of Criminal Procedure of 1925, which provides that the failure of any defendant to testify shall not be alluded to or commented on by counsel in the cause. That the remarks of the Prosecutor constituted a comment on the Petitioners' failure to testify in violation of said Article 710, as well as the principles of *Griffin v. California*, 380 U.S. 609, is clearly reflected in the opinion attached, the concurring opinion of condemnation by Judge W. T. McDonald (Appendix A) and the dissenting opinion of Judge W. A. Morrison (Appendix B).

No other implication can be derived from the language of the Prosecutor nor has the State of Texas offered any other in its opposition to Petitioners' Motion For Stay of the Mandate. A review of the creeping extensions and inroads into said Article 710 is reflected by the cases of *McPhail v. State*,

26 S.W. 2d 218; *Reese v. State*, 151 S.W. 2d 826; *Rose v. State*, 184 S.W. 2d 617. Such cases, when coupled with the decision below in this cause, amounts to a practical repeal of said Article 710 in violation of Petitioners' rights under the Fourteenth Amendment to the Constitution of the United States as reflected in *Griffin*.

2. Petitioners were denied their constitutional rights under the Fourteenth Amendment to the Constitution of the United States by the admission in evidence of the oral confessions of Petitioners made in absence of counsel and without offer of counsel.

The decision below is in direct conflict with *Wong Sun v. United States*, 371 U.S. 471. The arrest without warrant and for a misdemeanor offense not committed in the presence of an officer was illegal under the law of the State of Texas and it necessarily follows that the detentions based thereon were illegal. Thus, the facts fall within the rule of *Wong Sun* holding that evidence secured after illegal arrest and detention is inadmissible as a matter of law under the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

Further, the statements of the Petitioners were admitted in evidence in violation of this Court's opinion in *Escobedo v. Illinois*, 378 U.S. 478. It is undisputed in this cause that the interrogating officer advised the Petitioners to contact

an attorney only after his interrogation was completed and the oral statements made. Under the rule of *Escobedo*, it appears self-incriminating statements are inadmissible where the accused is not cautioned as to his constitutional rights to counsel even though he makes no request for counsel. The position of the Court of Criminal Appeals of Texas is rather clear on this point, that Court having heretofore limited the meaning and scope of *Escobedo v. Illinois*, 378 U.S. 478. Such position is directly and clearly contrary to this Court's expressions in *Rice v. Olson*, 324 U.S. 786, and *Carnley v. Cochran*, 368 U.S. 506, establishing the principal that where assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend upon a request. The reversals in *Doughty v. Maxwell*, 376 U.S. 202 and *McLeod v. Ohio*, 378 U.S. 582, even though there was a failure to request counsel, would clearly indicate that *Escobedo* is not inapplicable simply because counsel has not been requested.

CONCLUSION

WHEREFORE, Petitioners pray that the judgments and verdicts imposed on Petitioners in Cause Numbers 38,575 and 38,576, as affirmed by the Court of Criminal Appeals of Texas, be set aside, vacated and held for naught; that Petitioners' Petition for Writ of Certiorari be granted and that the judgments and verdicts without order or affirmance in

said causes be reversed and that this Court issue said Writ to the Court of Criminal Appeals of Texas as herein prayed.

Respectfully submitted,

RONALD R. WALDIE,
1115 Fidelity Building,
1000 Main Street,
Dallas, Texas 75202,

RALPH LYNN McDOWELL,
1115 Fidelity Building,
1000 Main Street,
Dallas, Texas 75202,

EMMETT COLVIN, JR.
1115 Fidelity Building,
1000 Main Street,
Dallas, Texas 75202,
Counsel for Petitioners.

CERTIFICATE OF SERVICE

I, EMMETT COLVIN, JR., one of the attorneys for Thomas Edward Bannon and Jack Carroll Smith, Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the .... day of April, 1966, I served copies of the foregoing Petition for Writ of Certiorari on the several parties representing Respondent, The State of Texas, as follows:

> Honorable Waggoner Carr, Attorney General for the State of Texas, Supreme Court Building, Box R, Capitol Station, Austin, Texas;
>
> Honorable Hawthorne Phillips, First Assistant Attorney General, State of Texas, Supreme Court Building, Box R, Capitol Station, Austin, Texas;
>
> Honorable Howard M. Fender, Assistant Attorney General, State of Texas, Supreme Court Building, Box R, Capitol Station, Austin, Texas; and
>
> Honorable Gilbert J. Pena, Assistant Attorney General, State of Texas, Supreme Court Building, Box R, Capitol Station, Austin, Texas,

by mailing copies in a duly addressed envelope, postage prepaid, to the above parties at the address so indicated.

.....

EMMETT COLVIN, JR.,
1115 Fidelity Building,
1000 Main Street,
Dallas, Texas.

APPENDIX A

THOMAS EDWARD BANNON,

Appellant,

No. 38,575

AND

JACK CARROLL SMITH,

Appellant,

No. 38,576

v.

THE STATE OF TEXAS,

Appellee.

Appeal from Dallas County

OPINION

The appellants were separately charged by information but were convicted upon a joint trial for misdeameanor theft; and the punishment for each was assessed at thirty days in jail and a fine of $100.

Howell A. Wall, the resident manager of a 16 unit apartment house testified that shortly after midnight March 6, he saw a late model gray Corvette Stingray automobile occupied by two men parked at the rear of the apartment house; that after a brief time and from a distance of ten feet, he saw said automobile parked in the driveway in front of the apartment house; that during the day of March 7, Dan McElveen, the owner, noticed that some furniture was

missing from an unoccupied apartment; and that he had not given anyone permission to take the furniture from the apartment.

Dan McElveen, owner of the apartment house, testified that on March 7, he determined that a chair, an end table and two lamps of the aggregate value of forty dollars which he saw on March 6, had been taken, without his consent, from one of his apartments. The loss of the furniture was reported to the police, and on April 3, he identified the furniture he had missing at the police station. Three girls had previously occupied the apartment.

Detective Helms testified that from his investigation of the theft of the furniture he determined that a gray Corvette Stingray had been seen at the apartment during the night the furniture was taken; that from a girl who had lived in the apartment he learned that she had dated the appellant Bannon; and his further investigation showed that Bannon owned the same type car as the one which was seen by Wall on March 7, at the apartment house and he obtained the license number of said car; that on March 15, when he stopped a car for speeding he observed that it was the same type car that had been seen at the apartment house, and he advised the occupants, who were the appellants, that he was a police officer, and after they identified themselves he told them that he wanted to talk with them about a case, and asked them to accompany him to the police station which they did by following him in their car. On talking with the appellant Bannon, alone, at the police station, Bannon at first denied but soon admitted to Helm

that he and Smith took the furniture from the apartment house. Officer Helm then called Smith into the room and upon being asked he admitted to Helm that he and Bannon took the furniture from the apartment. Both Bannon and Smith stated that the furniture was then in the apartment where they were living. When they agreed with officer Helm to bring the furniture to the police station, they left and in fifteen or twenty minutes they returned with the furniture in the gray Corvette Stingray, and later McElveen identified the furniture at the station as that removed from his apartment.

The appellants did not testify or offer any evidence in their behalf.

It is contended that the trial court erred in refusing to grant a mistrial on the ground that the prosecutor commented on appellants failure to testify.

The contention is directed to the following jury argument of the state: "I told you, Gentlemen, that we have brought you every scintilla of evidence that the Constitution or the laws of the State of Texas will allow us to bring you and told you everything about the case we know. I also want to read you something additional in the Charge." Then the state's attorney read the court's instruction in the charge on the failure of the appellants to testify.

The motion for mistrial on the ground that such argument, followed by a reading of that portion of the charge to the jury, violates the rules and is prejudicial and deprives the appellants of a fair trial, was overruled.

It is concluded that the argument complained of did not constitute a comment on the failure of the appellants to testify.

It is insisted that the trial court erred in admitting the oral statements of the appellants made while they were under arrest and for the failure to offer them effective assistance of counsel before the statements were made.

The evidence reveals that officer Helm stopped the appellants for speeding, identified himself as a police officer and when they had identified themselves, Helm told them he had a case he wanted to talk to them about and asked them to follow him in their car to the police station which they did. At this time Helm had talked with one of the girls who had previously occupied the apartment and while there she had had dates with Bannon; and Helm had obtained the license number of his car which was a gray Corvette Stingray, which corresponded with the car he had stopped for speeding. On talking with the appellants at the station, they admitted to Helm that they took the furniture and voluntarily brought it from their apartment to the station. No charges had been filed when they brought the furniture to the station. At this time Helm told them: "I'm not sure what charge I will file on you, and I would advise you to contact an attorney," and then released them, and the next day the attorney now representing the appellants telephoned Helm, and he advised him that they had not been filed on but he was going to do so, and in about two weeks they made an appearance bond.

The oral statement of the appellants that they took the furniture, which they soon brought to the station, and the

testimony of officer Helm that he had no knowledge of its location before the statements were made, authorizes the admission of such oral statements in evidence under the provisions of Art. 727, C.C.P. of 1925. *Langer v. State*, 343 S.W. 2d 463; *Henderson v. State*, 353 S.W. 2d 226.

The appellants never at any time requested counsel or that they be provided counsel before the making of any oral statement; and never asked to use the telephone or that any person be notified; and no attorney sought to confer with them. The contention as to the assistance of counsel before the statements were made is overruled.

The evidence is sufficient to support the convictions and no error appearing; the judgment is affirmed.

Belcher, Judge

(Delivered December 8, 1965)
Opinion approved by the Court

A-6

THOMAS EDWARD BANNON,

Appellant,

No. 38,575

AND

JACK CARROLL SMITH,

Appellant,

No. 38,576

v.

THE STATE OF TEXAS,

Appellee.

Appeal from Dallas County

CONCURRING OPINION

I concur in the affirmance, but I feel that just as a trial court is precluded from giving undue prominence in its charge to a jury by singling out particular facts or specific parts of testimony and charging thereon, a similar rule applies to a prosecutor in cases of this kind. He should not be allowed to utilize the court's charge as was done in the case at bar. True, any lawyer may read to the jury portions of the Court's charge, or all of the Court's charge. However, in those areas of our jurisprudence wherein restraint is imposed upon prosecutors to refrain from alluding to or mentioning the failure of a defendant to testify, I think it highly improper for a prosecutor to use the Court's charge as a vehicle to get before the jury what amounts to an improper comment by the prosecutor. I do not condone such practice. In fact, I condemn it. Such trial strategy, if allowed,

would in effect be arming the state with a weapon it is not entitled to use. The clear purpose and intent of Art. 658, V.A.C.C.P.* would be given a new and mis-intended meaning. A continuance of such trial antics will call for a reversal of many cases. While the complained of argument does border closely upon improper comment on the failure of appellants to testify, I agree that it does not call for a reversal of this case.

Judge Morrison joins in this concurring opinion.

McDonald, Presiding Judge

(Delivered December 8, 1965.)

APPENDIX B

THOMAS EDWARD BANNON,

Appellant,

No. 38,575

AND

JACK CARROLL SMITH,

Appellant,

No. 38,576.

v.

THE STATE OF TEXAS,

Appellee.

Appeals from Dallas County

OPINION
ON APPELLANT'S MOTION FOR REHEARING

The writer joined in the unanimous approval of the opinion of Commissioner Belcher affirming the above convictions in a joint trial and holding that the complained of argument did not constitute a comment on the failure of the appellants to testify. He did not join in the concurring opinion of his fellow judges condemning the conduct of counsel for the state because of such remarks, which they said border closely upon improper comment on such failure of appellants to testify, but did not call for reversal.

The complained of argument did or did not offend against the rule found in Art. 710 V.A.C.C.P., which provides that the failure of any defendant to testify shall not be alluded

to or commented on by counsel in the cause. If the complained of remarks did offend against this rule it is the duty of this court to enforce the statute and reverse. On the other hand, if, as we concluded unanimously on original submission, the remarks complained of did not constitute a comment on the failure of the defendants to testify, (and such remains the view of the writer) neither condemnation nor reversal is warranted.

Appellants' motion for rehearing is overruled.

Woodley, Judge.

(Delivered February 2, 1966.)

B-3

THOMAS EDWARD BANNON,

Appellant,

No. 38,575

AND

JACK CARROLL SMITH,

Appellant,

No. 38,576

v.

THE STATE OF TEXAS,

Appellee.

Appeal from Dallas County

DISSENTING OPINION ON APPELLANTS' MOTION FOR REHEARING

I respectfully dissent to the overruling of appellants' motions for rehearing. I will state my reasons.

I joined my brother McDonald in his concurrence on original submission. The argument complained of is here set forth:

> "MR. GLOVER: * * * I told you, Gentlemen, that we have brought you every scintilla of evidence that the Constitution or the laws of the State of Texas will allow us to bring you and told you everything about the case we know.
>
> I also want to read you something additional in the Charge. The court further instructs you that the law allows the defendant to testify in his own behalf, but a failure on his part to do so is not a circumstance against him and no presumption of guilt can be indulged in by the jury for a failure on his part to do so.

MR. WALDIE: Your Honor, I'd like to approach the bench at this time.

THE COURT: He wants to approach the bench.
(At this time a conference was held at the bench.)

MR. WALDIE: Your Honor, I'm going to at this time object to the line of argument of the counsel and move for a mistrial. Counsel knows the rules which we are bound under. We are bound the same as he is and he is in infraction of those rules and depriving the defendant of a fair trial. And for that reason, we move for a mistrial.

THE COURT: The court reporter has taken the statement of the district attorney, and I will overrule the motion for a mistrial.

MR. WALDIE: Note my exception.

MR. GLOVER: And no presumption of guilt can be indulged in the jury for a failure on his part to do so.

THE COURT: The record will show that the district attorney is reading from the Charge, all right.

MR. GLOVER: I tell you again, Gentlemen, the State has brought you every iota of evidence, every scintilla of evidence that the law will allow us to bring you.

MR. WALDIE: Your Honor, I'm going to move for a mistrial again. He's implying that we are hiding something by not testifying to this jury, that this is prejudicial and it biases these clients' rights to a fair trial, and move for a mistrial."

On rehearing counsel for appellants has pointed out that the original opinion and the concurrence will not act as a deterent to prosecutors, but will instead merely have the effect of establishing a guideline of permissible conduct whereby Article 710 V.A.C.C.P., the statute which prohibits an allusion or comment by counsel to an accused's failure

to testify, may be continually circumvented. Since such prohibition has now reached Federal Constitutional dimensions[1], I have become convinced that this Court should do more than condemn, as we did in *Holtzinger v. State*, 284 S.W. 2d 158, but should reverse these convictions.

[1] Griffin v. California, 380 U.S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229.

Morrison, Judge

(Delivered February 2, 1966)

APPENDIX C

Article 1422 of the Texas Penal Code:

> "Theft of property under the value of fifty dollars and over the value of five dollars shall be punished by imprisonment in jail not exceeding two years, and by fine not exceeding five hundred dollars, or by such imprisonment without fine; theft of property of the value of five dollars or under shall be punished by a fine not exceeding two hundred dollars."

APPENDIX D

Article 710, Texas Code of Criminal Procedure of 1925:

> "Any defendant in a criminal action shall be permitted to testify in his own behalf therein, but the failure of any defendant to so testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause; provided, that where there are two or more persons jointly charged or indicted, and a severance is had, the privilege of testifying shall be extended only to the party on trial."